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8 UNITED STATES DISTRICT COURT  
9 SOUTHERN DISTRICT OF CALIFORNIA  
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11 CARLOS HERNANDEZ OLIVERA, ) Civil No. 09cv1558 JLS (RBB)  
12 )  
13 Plaintiff, )  
14 v. ) **REPORT AND RECOMMENDATION**  
15 ) **DENYING PLAINTIFF'S MOTION FOR**  
16 ) **SUMMARY JUDGMENT [ECF NO. 12]**  
17 ) **AND GRANTING DEFENDANT'S**  
18 ) **CROSS-MOTION FOR SUMMARY**  
19 ) **JUDGMENT [ECF NO. 14]**  
20 )  
21 MICHAEL J. ASTRUE, Commissioner )  
22 of Social Security, )  
23 )  
24 )  
25 Defendant. )  
26 )  
27 )  
28 )

20 **I. PROCEDURAL BACKGROUND**

21 On February 21, 2006, Plaintiff, Carlos Hernandez Olivera  
22 ("Olivera"), filed an application for disability insurance benefits  
23 ("DIB") claiming a disability onset date of December 11, 2002.  
24 (Admin. R. Attach. #2, 26, ECF No. 9.) His claim was denied  
25 initially, and the denial was upheld by the Social Security  
26 Administration ("SSA") after reconsideration. (Id. at 26; id.  
27 Attach. #3, 80-81.) A hearing was held before Administrative Law  
28 Judge Edward Steinman on February 5, 2009. (Id. at Attach. #2, 26,

1 37-79.) He issued a written decision on February 19, 2009, finding  
2 Olivera was not disabled. (Id. at 36.) The denial of benefits  
3 became final when the Appeals Council upheld the ALJ's decision on  
4 May 14, 2009. (Id. at 1-3.)

5 On July 17, 2009, Plaintiff filed a Complaint for Judicial  
6 Review & Remedy on Administrative Decision Under the Social  
7 Security Act against Michael J. Astrue, Defendant Commissioner of  
8 Social Security, challenging the denial of Plaintiff's claim for  
9 disability insurance benefits [ECF No. 1]. Defendant filed an  
10 Answer on February 2, 2010 [ECF No. 7] and filed the Administrative  
11 Record the same day [ECF No. 9]. The Court issued an Order Setting  
12 Deadline for Filing Pretrial Motions [ECF No. 10], but Plaintiff's  
13 Motion for Summary Judgment was not timely filed. An Order to  
14 Show Cause why the Court should not recommend that the Complaint be  
15 dismissed for failure to prosecute was issued on June 14, 2010 [ECF  
16 No. 11]. Plaintiff responded to the Order to Show Cause on June  
17 21, 2010, by filing a Motion to Extend Time to File Motion for  
18 Summary Judgment along with a Motion for Summary Judgment [ECF No.  
19 12]. Defendant did not reply to the Order to Show Cause; the Court  
20 vacated the Order, granted Plaintiff's request for an extension of  
21 time, and set a hearing date for the Motion for Summary Judgment  
22 [ECF No. 13].

23 On July 19, 2010, Defendant's Opposition to Plaintiff's Motion  
24 for Summary Judgment and Defendant's Cross-Motion for Summary  
25 Judgment were filed as a single document [ECF No. 14].

26 The Court finds this matter is suitable for decision without  
27 oral argument pursuant to Civil Local Rule 7.1(d)(1). S.D. Cal.  
28 Civ. L.R. 7.1(d)(1). For the reasons set forth below, the Court

1 recommends **DENYING** Plaintiff's Motion for Summary Judgment [ECF No.  
2 12] and **GRANTING** Defendant's Cross-Motion for Summary Judgment [ECF  
3 No. 14].

## 4 II. MEDICAL EVIDENCE

5 The majority of the medical evidence regarding Olivera's  
6 mental condition was part of his workers' compensation case. On  
7 April 19, 2004, Psychiatrist Stephen Singer issued a Medical-Legal  
8 Evaluation of Olivera, who he had examined on January 23, 2004.<sup>1</sup>  
9 (Admin. R. Attach. #8, 587-97, ECF No. 9.) The doctor conducted a  
10 mental status exam and found Plaintiff to be pleasant, cooperative,  
11 and appropriately dressed and groomed. (Id. at 590.) Dr. Singer  
12 observed that "[Olivera's] mood was mildly depressed and while his  
13 affect was appropriate and consistent with his mood it was slightly  
14 flattened." (Id. at 591.) The doctor described Plaintiff's  
15 cognition as "grossly intact for attention, concentration,  
16 language, short and long term memory." (Id.) Olivera did not  
17 suffer from any thought disturbances or perception disorders.  
18 (Id.)

19 Dr. Singer ruled out certain diagnoses: (1) depression,  
20 major, single, mild to moderate; (2) adjustment disorder with  
21 depression; and (3) posttraumatic stress disorder, mild. (Id. at  
22 594.) But he found that Olivera had a compression fracture and  
23 suffered from sexual dysfunction and premature ejaculation. (Id.)  
24 The psychiatrist gave Plaintiff a global assessment of functioning  
25 ("GAF") score of sixty to sixty-five. (Id.) Dr. Singer concluded  
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27 <sup>1</sup> Although Plaintiff filed this suit as "Carlos Hernandez Olivera," many of  
28 the medical records identify him as "Carlos Hernandez." For the sake of  
consistency, the Court has identified the Plaintiff as "Olivera" rather than  
"Hernandez."

1 that "[w]hile [Olivera] has some mild depressive symptoms, these  
2 are not of a degree that would interfere with his being able to  
3 engage in vocational rehabilitation." (Id. at 596.) "He does not  
4 have a disability that would interfere with his ability to engage  
5 in these activities and no permanent partial disability is  
6 anticipated." (Id.)

7 On October 12, 2004, almost nine months after Dr. Singer  
8 examined Plaintiff, Dr. Robert Zink prepared a Report of  
9 Psychological Testing of Olivera. (Id. Attach. #7, 523-30.) The  
10 doctor noted that Plaintiff "achieved borderline to low average  
11 scores" in the Wechsler Adult Intelligence Scale. (Id. at 524-25.)  
12 Olivera's "Bender memory was 5-1/2 items, which [was] in the  
13 approximate average range for this test of visual memory." (Id. at  
14 525.) A Millon Clinical Multiaxial Inventory showed that Plaintiff  
15 may overstate his symptoms, but he had "underlying dependent  
16 personality factors with avoidant features." (Id.) The test also  
17 "suggest[ed] generalized anxiety, somatoform features, depression,  
18 and possible Post Traumatic Stress features." (Id.) Long term  
19 depression and negativistic features were both ruled out. (Id.)  
20 Several Beck inventories showed moderate to severe levels of  
21 anxiety, severe perceptions of depression, and moderate levels of  
22 pessimism about his future. (Id. at 528.)

23 Dr. Zink also evaluated Olivera's work functions. (Id.) He  
24 found that Plaintiff's "[c]oncentration [did] not appear  
25 significantly impaired . . . . [h]owever considering the degree of  
26 emotional distress, he may still experience occasional  
27 concentration impairment during escalations of the emotional  
28 distress." (Id. at 528-29.) The doctor found that Olivera's

1 memory was not impaired, but his visual and scanning speed was "a  
2 little lower than one would expect . . . and this may be [a] result  
3 of momentary mental concentration impairment." (Id. at 529.)  
4 Additionally, Plaintiff's IQ functioning was also "a little lower  
5 then what would be expected . . . ." (Id.) Dr. Zink concluded  
6 that there was likely a mental impairment, but he deferred the  
7 question of whether it presented a disability to Dr. Brickman, the  
8 principal examiner. (Id.)

9 On October 27, 2004, Dr. Brickman, a psychiatrist, completed  
10 his Agreed Medical/Legal Evaluation in Psychiatry of Olivera. (Id.  
11 at 532-45.) He noted Plaintiff's chief complaints and the history  
12 of his illness. (Id. at 535-37.) The doctor also reviewed the  
13 medical evidence including doctor visits, psychological tests, and  
14 mental status examinations. (Id. at 537-43.) Dr. Brickman  
15 concluded that Plaintiff suffered from (1) major depressive  
16 disorder, single episode, moderate; (2) pain disorder associated  
17 with psychological factors and a general medical condition; (3)  
18 panic disorder without agoraphobia; and (4) premature ejaculation.  
19 (Id. at 543.) He explained that Olivera remained temporarily,  
20 partially psychiatrically disabled and required appropriate  
21 psychiatric treatment. (Id. at 544.) Although his symptoms had  
22 worsened since Dr. Singer's April 19, 2004 report, there was  
23 insufficient evidence to find Plaintiff temporarily, totally  
24 psychiatrically disabled. (Id.) Dr. Brickman stated, "[Olivera's]  
25 [d]epression is such that, for the moment, I doubt that he could  
26 participate adequately with [v]ocational [r]ehabilitation." (Id.  
27 at 545.)  
28

1 Plaintiff saw Dr. Louis Fontana, a psychiatrist, for an  
2 initial psychiatric consultation on December 17, 2004. (Id. at  
3 314.) The doctor performed a mental status exam on Olivera. (Id.  
4 at 318.) Plaintiff made good eye contact, was cooperative, and did  
5 not exaggerate or embellish his comments during the interview.  
6 (Id.) His mood was dysphoric. (Id.) He was sad and cried while  
7 speaking about his financial situation. (Id.) Olivera's "[s]peech  
8 [was] of normal tone and meter[,] and his "[t]hought processes  
9 [were] logical and goal-directed." (Id.) The doctor found no  
10 evidence of hallucinations or delusions, and Plaintiff denied  
11 having suicidal thoughts. (Id.) With regard to his intellectual  
12 functioning, "[Olivera] [was] oriented in all spheres." (Id.) His  
13 "[i]mmediate, recent and remote memory appear[ed] intact[,] and  
14 his knowledge, judgment, and insight were all adequate. (Id.)

15 Dr. Fontana diagnosed Plaintiff with multiple psychological  
16 disorders: (1) major depressive disorder, single episode,  
17 moderate; (2) pain disorder associated with both psychological  
18 factors and a general medical condition; (3) panic disorder without  
19 agoraphobia; (4) post-traumatic stress disorder, chronic, mild; (5)  
20 male erectile disorder; and (6) premature ejaculation. (Id. at  
21 319-20.) The doctor also noted that the psychological testing  
22 performed by Dr. Zink revealed dependant and avoidant personality  
23 factors. (Id. at 320.) Dr. Fontana "agree[d] with Dr. Brickman,  
24 in that [Olivera] would be unable to participate currently in  
25 vocational rehabilitation secondary to his psychiatric symptoms."  
26 (Id.) The doctor concluded that Plaintiff was temporarily,  
27 partially psychiatrically disabled. (Id.)

28

1 Olivera was seen by Dr. Fontana on December 31, 2004, January  
2 21, February 3, March 3, April 14, June 9, July 8 and 29, August  
3 19, September 23, and November 18, 2005. (Id. at 303-13.)  
4 Throughout his treatment, the doctor's diagnosis of Olivera did not  
5 change. (Id.) Except for the meetings in December 2004, in which  
6 the doctor explicitly found Olivera was temporarily, partially  
7 disabled, Dr. Fontana referred to Dr. Brickman's agreed medical  
8 evaluation to describe Plaintiff's psychological disability status.  
9 (Id. at 303-13, 321.)

10 On May 23, 2005, Dr. Roberto Netter evaluated Olivera and  
11 completed a psychological consultation report on June 15, 2005.  
12 (Id. Attach. #8, 554-68.) The doctor reviewed Olivera's records  
13 and asked him about his current physical and psychological  
14 symptoms, his injury, other sources of stress, and his personal  
15 history. (Id. at 554-63.)

16 Then, the psychologist conducted a mental status evaluation.  
17 (Id. at 563-66.) The doctor noted that Olivera "maintained  
18 slightly limited eye contact, and his face alternated between being  
19 passively expressionless and openly dysphoric with profuse tears."  
20 (Id. at 563-64.) Plaintiff was polite and cooperative, but his  
21 mood was "dysphoric." (Id. at 564.) Olivera was alert and showed  
22 no signs of perceptual impairment or thought disorder, but "[h]is  
23 thought processes were slow." (Id.) He was properly oriented,  
24 displayed good judgment, had an average level of intelligence and a  
25 low-average level of socio-cultural sophistication. (Id.)  
26 Olivera's insight into his psychological difficulties and  
27 functioning was limited, and "[h]is memory was slightly impaired,  
28 in association with psychomotor retardation." (Id.) Plaintiff was

1 a reliable historian with "signs of minor distortions favoring his  
2 own perspective noted . . . ." (Id.)

3 Dr. Netter performed some psychological testing on Plaintiff  
4 and found that he had "slight-to-moderate self-perceived anxiety,  
5 depression, and hopelessness; contrasting with moderate-to-severe  
6 anxiety and moderate depression when self-report[ed] . . . ." (Id.  
7 at 564-65.) Olivera was diagnosed with posttraumatic stress  
8 disorder, adjustment disorder with depressed mood, pain disorder  
9 associated with both psychological factors and a general medical  
10 condition, and psychological factors affecting a medical condition  
11 including hypertension and elevated cholesterol. (Id. at 565.)  
12 The doctor noted psychological stressors including dealing with the  
13 workers' compensation system and related economic hardships. (Id.)  
14 Plaintiff was given a GAF score of fifty and was found temporarily,  
15 partially psychiatrically disabled. (Id. at 565-66.) Dr. Netter  
16 explained, "At this time, [Olivera] is precluded from engaging in  
17 work that would lead to increased psychologically-mediated  
18 exacerbated physical pain, for such will lead to increased anxiety  
19 and depression, and maintenance of this vicious cycle." (Id. at  
20 567.)

21 On October 3, 2005, Dr. Netter prepared a psychological  
22 treatment report for Olivera. (Id. at 607-12.) The doctor found  
23 that Plaintiff still exhibited pain behaviors, he had predominately  
24 neutral facial expressions with occasional unresponsiveness, he  
25 felt constricted, his mood was guardedly depressed and anxious, his  
26 speech was low in amplitude and modulated, and the content of his  
27 thought was limited and reflected marked helplessness. (Id. at  
28 610.) Olivera's eye contact was slightly limited, which was an



1 improvement. (Id.) His thought process was slow, and his memory  
2 in association with psychomotor retardation was slightly impaired,  
3 which was also an improvement. (Id.) He had slight-to-moderate  
4 anxiety and depression. (Id.)

5 The doctor diagnosed Plaintiff with posttraumatic stress  
6 disorder, major depressive disorder, pain disorder associated with  
7 psychological factors and a general medical condition, and  
8 psychological factors affecting a medical condition including  
9 hypertension and elevated cholesterol. (Id.) Olivera was given a  
10 GAF score of fifty and found to be temporarily, partially  
11 psychiatrically disabled. (Id. at 610-11.)

12 On June 17, 2006, Dr. Romulado Rodriguez, a psychiatrist,  
13 performed a complete psychiatric evaluation of Plaintiff. (Id.  
14 Attach. #7, 355-61.) The mental status exam included the doctor's  
15 observations of Olivera's appearance, thought process, speech,  
16 mood, and intellect as well as a memory test, concentration and  
17 calculation exercise, and the doctor inquired into Plaintiff's  
18 knowledge of current events, meaning of proverbs, ability to  
19 explain similarities between different objects and his judgment.  
20 (Id. at 358-59.) Dr. Rodriguez diagnosed Plaintiff with dysthmic  
21 disorder and noted that "[p]sychosocial stressors over the past  
22 year [were] [m]inimal." (Id. at 559-60.) He assessed Olivera's  
23 GAF score at seventy and concluded that he had no functional  
24 limitations. (Id. at 360.)

25 On June 26, 2006, a psychiatric review technique form was  
26 completed by Disability Evaluation Analyst Jamias and approved by  
27 Dr. Amado. (Id. at 363-74.) Plaintiff was found to have an  
28 affective disorder that was not severe. (Id. at 363, 374.)

1 Specifically, Plaintiff had dysthymic disorder. (Id. at 366.)  
2 Plaintiff was found to have mild restrictions on daily living, mild  
3 difficulty in maintaining social functioning, and mild difficulties  
4 in maintaining concentration, persistence, and pace. (Id. at 371.)

5 On August 14, 2006, Dr. Singer examined Olivera and reported  
6 on the initial psychiatric evaluation on September 29, 2006. (Id.  
7 Attach. #8, 617-21.) Plaintiff was pleasant, cooperative, and  
8 neatly dressed. (Id. at 620.) The doctor noted that Olivera "did  
9 not show psychomotor retardation or agitation or any eccentricities  
10 of behavior." (Id.) He appeared worried and anxious, but his  
11 affect was appropriate and consistent with his mood. (Id.) He had  
12 no thought disturbances in form or content, and no disorder of  
13 perception. (Id.) "[C]ognition was grossly intact for attention,  
14 concentration, language, short and long term memory." (Id.) Dr.  
15 Singer diagnosed Plaintiff with depression, major, single,  
16 moderate, and panic disorder. (Id.) He gave Olivera a GAF score  
17 of fifty to sixty and explained that he had "significant depression  
18 with recurrence of symptoms after discontinuation of his medication  
19 even though he has continued to consult with Dr. Netter." (Id.)  
20 Dr. Singer performed employee work status evaluations on June 5,  
21 August 14, and September 15, 2006. (Id. at 622-23, 625.) The  
22 doctor indicated that Plaintiff should remain off of work. (Id.)

23 Dr. Zink prepared a report of psychological retesting on  
24 October 11, 2006. (Id. at 629-35.) Olivera received low average  
25 to average scores on several subtests from the Wechsler Adult  
26 Intelligence Scale III, and "[t]his was a mild improvement over the  
27 scores of October 2004 . . . ." (Id. at 631.) The digit symbol  
28 subtest indicated Plaintiff had no "substantial loss of mental

1 concentration ability at the time he completed the test." (Id.)  
2 Olivera had no signs of organic dysfunction. (Id.) A Millon  
3 Clinical Multiaxial Inventory produced results similar to those  
4 from 2004 and showed that Plaintiff may overstate some of his  
5 symptoms and he likely had "dependant, avoidant, and socially  
6 withdrawn personality characteristics." (Id. at 632.) From 2004  
7 to 2006, Olivera's self-reporting of anxiety increased from  
8 moderate to severe, but his depression level decreased from severe  
9 to moderate, and his hopelessness score also decreased from  
10 moderate to mild. (Id. at 634.)

11 Dr. Zink ruled out posttraumatic stress disorder but found  
12 "significant residual anxious, depressive, and somatoform  
13 features." (Id. at 635.) "Dependent, avoidant, and socially  
14 withdrawn personality factors [were also] suggested by the Millon."  
15 (Id.) With regard to work functions, the doctor found that (1)  
16 Plaintiff's concentration was not substantially impaired, but he  
17 may still experience occasional impairment during emotional  
18 distress; (2) his memory was unimpaired; (3) Olivera's visual  
19 scanning/speed was not substantially impaired; and (4) Plaintiff's  
20 IQ functioning was in the low average to average range. (Id.)

21 On October 31, 2006, Dr. Brickman wrote an agreed medical  
22 reevaluation in psychiatry for Olivera. (Id. at 656-65.)  
23 Plaintiff's subjective factors of disability included "pessimism,  
24 demoralization, [and] minor avoidant characteristics." (Id. at  
25 662.) The doctor diagnosed Olivera with (1) posttraumatic stress  
26 disorder that was in partial remission; (2) major depressive  
27 disorder, single episode, work related; and (3) pain disorder  
28 associated with both psychological factors and a general medical

1 condition, chronic. (Id. at 659-61.) Plaintiff was permanent and  
2 stationary and had a GAF score of 63.5. (Id. at 661.)

3 Dr. Brickman completed a psychiatric disability impairment  
4 form and evaluated limitations on Olivera's work functioning. (Id.  
5 at 664-65.) He found that Plaintiff's abilities to perform complex  
6 or varied tasks, relate to other people beyond giving and receiving  
7 instruction, and accept and carry out responsibility for direction,  
8 control and planning were all slightly limited. (Id.) Plaintiff's  
9 abilities to influence other people and to maintain a work pace  
10 appropriate to a given work load were very slightly limited. (Id.)  
11 Olivera had minimal limitations on his abilities to comprehend and  
12 follow instruction, perform simple and repetitive tasks, and make  
13 generalizations, evaluations, or decisions without immediate  
14 supervision. (Id.)

15 The doctor concluded, "I do not believe that [Olivera], on the  
16 basis of a work-related, purely Psychiatric Disability, is  
17 currently incapable of returning to his usual and customary  
18 occupation . . . ." (Id. at 662 (emphasis in original).) Dr.  
19 Brickman found that Plaintiff was no longer temporarily disabled.

20 There is no indication that [Olivera] was ever  
21 Temporarily Totally Psychiatrically Disabled over  
22 the years; onset of Temporary Partial Psychiatric  
23 Disability (Major Depressive Disorder/Post-  
24 Traumatic Stress Disorder/Adjustment  
25 Disorder/Sexual Dysfunction) occurred (formally,  
supported by records) at the time of [Olivera's]  
first evaluation by Dr. Singer, the Treating  
Psychiatrist, on January 23, 2004. Applicant's  
Temporary Partial Psychiatric Disability is now  
at an end.

26 (Id. at 661.)

27 Dr. D. J. Williams reviewed a psychiatric case summary of  
28 Plaintiff on April 25, 2007, and affirmed the initial decision that

1 Olivera did not suffer from a severe mental impairment. (Id.  
2 Attach. #7, 398.) The last day that Plaintiff was eligible for  
3 Social Security disability benefits was December 31, 2007. (Id.  
4 Attach. #2, 27.)

5 On February 3, 2009, two days before the administrative  
6 hearing, Dr. Jaga Glassman, a psychiatrist, conducted a psychiatric  
7 disability evaluation of the Plaintiff. (Id. Attach. #8, 682-89.)  
8 The doctor reviewed Olivera's history and considered his current  
9 medications and daily activities. (Id. at 683-86.) He found  
10 Olivera "well-engaged with the examiner, making and maintaining  
11 good eye contact." (Id. at 686.) Plaintiff had low energy, was  
12 apathetic, preoccupied, and "considerably depressed-appearing."  
13 (Id.) He showed some variation in affect, and no significant  
14 anxiety during the interview; generally, his mood was "sour, sad,  
15 with low energy and somewhat low motivation." (Id. at 687.)  
16 Plaintiff did not display psychotic symptoms, and his "responses  
17 were coherent, relevant, and goal-directed . . . ." (Id.) "He was  
18 able to follow all instructions without difficulty." (Id.) The  
19 doctor found that Olivera had "low-average to borderline  
20 intellectual functioning." (Id.)

21 Dr. Glassman diagnosed Plaintiff with (1) pain disorder with  
22 medical and psychological factors; (2) major depression, moderate,  
23 ongoing; (3) anxiety disorder, not otherwise specified; and (4)  
24 possible panic disorder with phobic avoidance. (Id. at 689.) He  
25 found "possible borderline intellectual functioning" and assigned  
26 Olivera a GAF score of fifty. (Id.) Dr. Glassman concluded, "It  
27 will be difficult for this man to be able to return to productive,  
28 full-time work, given his combination of problems. . . . His

1 ongoing depression and anxiety is likely to impair his capacity to  
2 retrain successfully in a nonphysical type of employment." (Id.)

### 3 **III. THE ADMINISTRATIVE HEARING**

4 On February 5, 2009, the administrative hearing was held  
5 before ALJ Steinman. (Id. Attach. #2, 39.) Olivera and his  
6 attorney, Mr. Jackson, were present. (Id.) Judge Steinman heard  
7 testimony from Olivera; Dr. Gurvey, a medical expert; and Dr.  
8 Jesko, a vocational expert. (Id.)

9 At the hearing, Plaintiff testified that he could not work due  
10 to his back injury and psychiatric problems. (Id. at 42.) Judge  
11 Steinman questioned Olivera about his back condition and pain.  
12 (Id. at 42-47.) Plaintiff's attorney also questioned him about  
13 limitations caused by his back problems and pain. (Id. at 47.)

14 The administrative law judge asked Dr. Gurvey about Olivera's  
15 back injury and whether Plaintiff had any physical limitations as a  
16 result. (Id. at 48-50.) The medical expert testified that Olivera  
17 "could occasionally lift and carry 20 pounds, frequently lift and  
18 carry 10 pounds. He could sit, stand, and walk six out of eight  
19 hours with the usual breaks. There would be no restriction with  
20 regard to push/pull." (Id. at 49.) The doctor stated that  
21 "[p]losturally [Plaintiff] should not climb ladders, scaffolds, or  
22 ropes." (Id.) Olivera could occasionally crawl and he had "[n]o  
23 other restrictions. Manipulative, environmentally, or  
24 audiovisually . . . ." (Id. at 50.) Plaintiff's attorney also  
25 questioned the medical expert regarding Olivera's physical  
26 limitations. (Id. at 50-53.)

27 The ALJ presented several hypothetical questions to the  
28 vocational expert, Dr. Jesko. (Id. at 54-62.) The judge's first

1 hypothetical included certain physical limitations due to  
2 degenerative disc disease. (Id. at 54.) Judge Steinman's second  
3 hypothetical added the psychiatric diagnosis of dysthmic disorder  
4 (depression) and a GAF score of seventy. (Id. at 55.) With a  
5 third hypothetical, the judge added more physical limitations and  
6 asked the vocational expert to give examples of jobs that would be  
7 available to that individual. (Id.) Dr. Jesko testified that the  
8 individual could be a garment folder, small parts assembler, or a  
9 gluer. (Id. at 55-56.)

10 Judge Steinman posed another hypothetical and added the  
11 minimal and slight mental limitations from Dr. Brickman's  
12 psychiatric evaluation of Olivera from 2006. (Id. at 57.) The  
13 vocational expert explained that the jobs she previously identified  
14 were "simple and repetitive[,] one and two step" positions, so they  
15 were not affected by the additional mental limitations. (Id. at  
16 58.)

17 The administrative law judge presented another hypothetical to  
18 Dr. Jesko that included certain physical limitations. (Id. at 59.)  
19 Judge Steinman then stated, "I'm going to give him the benefit of  
20 the doubt. Let's just limit him to simple repetitive [tasks]."  
21 (Id.) He also added the restrictions of limited contact with the  
22 general public and coworkers." (Id. at 60.) The vocational expert  
23 testified that the individual would be able to perform the three  
24 jobs she previously identified. (Id.)

25 Next, Olivera's attorney questioned the vocational expert.  
26 (Id. at 62-79.) Attorney Jackson noted that Dr. Glassman gave  
27 Plaintiff a GAF score of fifty and asked, "Would it be fair to  
28 extrapolate those restrictions to a GAF score of 50 . . . ?" (Id.

1 at 67.) The vocational expert explained that it "would be beyond  
2 [her] expertise[,]" and the question would be better answered by a  
3 psychologist or psychiatrist. (Id.)

4 Plaintiff's counsel next posed a hypothetical using Dr.  
5 Netter's report dated May 23, 2005. (Id. at 67-71.) The judge  
6 interjected and read a portion of the report. "It's reasonably  
7 expected Mr. [Olivera] will not be able to return to his customary  
8 work duties secondary to residual symptoms of post-traumatic stress  
9 disorder." (Id. at 70.) The report continued, "At this time, he's  
10 precluded from engaging in work that would lead to increased  
11 psychologically mediated exacerbated physical pain for such would  
12 lead to increased anxiety and depression and maintenance of this  
13 vicious cycle." (Id.) The vocational expert responded that it was  
14 difficult to answer the hypothetical because pain is subjective.  
15 (Id.) She asked that the hypothetical include the level of work  
16 that would exacerbate his pain. (Id.) Judge Steinman suggested  
17 using Olivera's testimony regarding his physical limitations. (Id.  
18 at 70-71.) The vocational expert responded that the individual  
19 would not be able to perform any work under those circumstances.  
20 (Id.)

#### 21 IV. THE ALJ'S DECISION

22 After considering the record, ALJ Steinman concluded that  
23 Olivera suffered from two severe impairments: degenerative disc  
24 disease, status post-fracture of the L1 vertebrae, and depression.  
25 (Id. at 27.) He also made the following relevant findings:

26 Louis A. Fontana, M.D., reported on December  
27 17, 2004, that the claimant was seen for a  
28 psychiatric consultative examination. The claimant  
complained of back pain with radiation to his  
buttocks and at time to his feet, as well as



1 sexual problems and nightmares of his fall. He  
2 began having flashbacks and panic symptoms. After  
3 examination, the claimant was diagnosed with  
4 single episode, moderate major depressive  
5 disorder; pain disorder associated with both  
psychological and a general medical condition;  
panic disorder without agoraphobia; chronic, mild  
posttraumatic stress disorder ("PTSD"), and  
erectile disorder.

6 At the request of the California Department  
7 of Social Services, the claimant was seen by  
8 Romualdo R. Rodriguez, M.D., for a clinical  
9 psychiatric consultative examination. Dr. Rodriguez  
10 reported on June 17, 2006, that the claimant  
11 stated he had not been able to work since his  
12 accident or look for jobs due to his back pain.  
13 He complained of developing depression and he had  
settled his worker's compensation case in 2002 for  
\$20,000. After examination, the claimant was  
diagnosed with dysthymic disorder and a Global  
Assessment of Functioning ("GAF") of 70 indicating  
some mild symptoms or some difficulty in social,  
occupational, or school functioning.

14 Jaga N. Glassman, M.D., reported on February  
15 3, 2009, that the claimant was seen at the request  
16 of the California Department of Social Services  
17 for a psychiatric disability evaluation. The  
18 claimant stated that it had been a while since he  
19 had seen a doctor. The claimant complained of low  
20 back pain and depression and that his thought  
21 processes were not clear. He stated that he could  
22 not stay in one position long and that activity  
23 aggravated his pain. He was not in any kind of  
24 psychiatric or mental health treatment and no  
history of psychiatric hospitalizations or suicide  
attempts. He only had over the counter  
medications for pain. On examination, he was  
depressed appearing. The claimant was diagnosed  
with pain disorder with medical and psychological  
factors, ongoing moderate major depression,  
anxiety disorder not otherwise specified, possible  
panic disorder with phobic avoidance, possible  
borderline intellectual functioning, and a GAF of  
50.

25 The undersigned took into consideration all  
26 the claimant's other diagnosed conditions and  
27 finds that there is minimal clinical evidence to  
28 corroborate or support any finding of significant  
vocational impact related [to] them.

4. Through the date last insured, the  
claimant did not have an impairment or combination  
of impairments that met or medically equaled one

1 of the listed impairments in 20 CFR Part 404,  
2 Subpart P, Appendix 1 (20 CFR 404.1525 and  
3 404.1526).

4 . . . .

5 The claimant's mental impairment did not meet  
6 or medically equal the criteria of listing 12.04.  
7 In making this finding, the undersigned has  
8 considered whether the "paragraph B" criteria were  
9 satisfied. To satisfy the "paragraph B" criteria,  
10 the mental impairment must result in at least two  
11 of the following: marked restriction of  
12 activities of daily living; marked difficulties in  
13 maintaining social functioning; marked  
14 difficulties in maintaining concentration,  
15 persistence, or pace; or repeated episodes of  
16 decompensation, each of extended duration. A  
17 marked limitation means more than moderate but  
18 less than extreme. Repeated episodes of  
19 decompensation, each of extended duration, means  
20 three episodes within 1 year, or an average of  
21 once every 4 months, each lasting for at least 2  
22 weeks.

23 . . . Dr. Rodriguez reported on June 17,  
24 2006, that the claimant is able to dress and  
25 undress himself, drive a car, run errands, go to  
26 the store, cook, participate in household chores,  
27 go for walks, watch television, handle cash, and  
28 pay bills. Dr. Glassman reported on February 3,  
2009, that the claimant is able to perform his  
self grooming, help with household chores, wash  
dishes, pick up, go grocery shopping, help his  
wife at the Laundromat, rake leaves, go for walks,  
and watch television.

19 In social functioning, the claimant had mild  
20 difficulties. The claimant reported that he lived  
21 with his wife and child, talked over the telephone  
22 with people and met them socially, and went to  
23 church. Dr. Fontana reported on December 17,  
2004, that the claimant lived with his wife and  
24 two children. . . . Dr. Glassman reported on  
25 February 3, 2009, that the claimant was married  
26 and worked with his wife in daily activities.

27 With regard to concentration, persistence or  
28 pace, the claimant had moderate difficulties. His  
cognitive ability and memory are intact and the  
medical reports indicate that he functions at a  
higher level that would allow him to do basic work  
activity. The undersigned notes that the claimant  
went into great detail answering his adult  
function report and disability report. This is  
indicative of an ability to maintain an acceptable

1 level of concentration to perform at least simple  
2 tasks.

3 As for episodes of decompensation, the  
4 claimant had experienced no episodes of  
decompensation, which have been of extended  
duration.

5 Because the claimant's mental impairment did  
6 not cause at least two "marked" limitations or one  
"marked" limitation and "repeated" episodes of  
7 decompensation, each of extended duration, the  
"paragraph B" criteria were not satisfied.

8 The undersigned has also considered whether  
9 the "paragraph C" criteria were satisfied. In  
this case, the evidence fails to establish the  
10 presence of the "paragraph C" criteria. There are  
no extended episodes of decompensation and the  
11 claimant is not expected to decompensate with an  
increase in mental demands. Moreover, he does not  
12 need to live in a highly structured living  
arrangement.

13 . . . . .

14 5. After careful consideration of the entire  
15 record, the undersigned finds that, through the  
date last insured, the claimant had the residual  
16 functional capacity to perform light work as  
defined in 20 CFR 404.1567(b) except he is not  
17 able to climb ladders, ropes, or scaffolds; can  
occasionally crawl; and is limited to nonpublic,  
18 simple, repetitive work that requires limited  
contact with coworkers.

19 . . . . .

20 In terms of the claimant's alleged disabling  
21 impairments, the record fails to document any  
objective clinical findings establishing that the  
22 claimant was not able to perform work in light of  
the reports of the treating and examining  
23 practitioners and the findings made on  
examination.

24 . . . Dr. Fontana reported on December 17,  
25 2004, that . . . . [claimant's] thought processes  
were logical and goal directed and there was no  
26 evidence of hallucinations or delusions. He was  
oriented in all spheres and his immediate, recent,  
27 and remote memory was intact. Dr. Rodriguez  
reported on June 17, 2006, that the claimant was  
28 coherent and organized and there was no  
tangentiality or loosening of associations. He  
was relevant and nondelusional. He denied any

1 auditory or visual hallucinations. He was alert  
 2 and oriented in all spheres. . . . Dr. Glassman  
 3 reported on February 3, 2009, that the claimant  
 4 stated that he could perform a very simple job  
 5 that was not physically demanding and would allow  
 6 him to change position frequently. He had no  
 7 evidence of anxiety and was able to follow  
 8 instructions.

9 . . . .

10 As for the opinion evidence, Robert Netter,  
 11 Ph.D., reported on June 15, 2005, that the  
 12 claimant had a GAF of 50. On September 26, 2006,  
 13 Stephen F. Signer, reported that the claimant had  
 14 a GAF of 50-60. Dr. Brickman reported on October  
 15 31, 2006, that the claimant had a GAF of 63.5.  
 16 Pursuant to 20 CFR § 404.1527 and Social Security  
 17 Ruling 96.2p, the undersigned assigns significant  
 18 weight to this opinion, as it is well-supported by  
 19 the medical evidence finding that the claimant has  
 20 moderate mental impairment symptoms.

21 Chris S. Pallia, M.D., reported on February  
 22 14, 2003, through August 6, 2003, that the  
 23 claimant was totally temporarily disabled. . . .  
 24 Louis A. Fontana, M.D., reported on December 17,  
 25 2004, that the claimant was temporarily partially  
 26 psychiatrically disabled. J. Brand Brickman,  
 27 M.D., reported on October 12, 2004, that the  
 28 claimant was temporarily partially psychiatrically  
 disabled. A treating physician's medical opinion,  
 on the issue of the nature and severity of  
 impairment, is entitled to special significance;  
 and, when supported by objective medical evidence  
 and consistent with otherwise substantial evidence  
 of record, entitled to controlling weight.  
 However, statements that a claimant is 'disabled',  
 'unable to work' can or cannot perform a past job,  
 meets a listing or the like are not medical  
 opinions but are administrative findings  
 dispositive of a case, requiring familiarity with  
 the Regulations and legal standards set forth  
 therein and in the Dictionary of Occupational  
Titles. Such issues are reserved to the  
 Commissioner. Furthermore, the record fails [to]  
 support the doctor's opinion that claimant is  
 incapable of all work.

1 . . . .

2 On October 12, 2004, Robert Zink, Ph.D.,  
 3 reported testing revealed that the claimant was  
 4 not significantly impaired in concentration, had  
 5 unimpaired memory, a little lower than one would

1 expect visual scanning/speed and borderline to low  
2 average IQ functioning.

3 Dr. Brickman and Dr. Zink reported on October  
4 11, 2006, that the claimant did not appear to have  
5 substantially impaired concentration or visual  
6 scanning/speed, unimpaired memory, and IQ  
7 functioning in the low average to average range.

8 Pursuant to 20 CFR § 404.1527, the  
9 undersigned assigns significant weight to these  
10 examining doctor's opinions, as they are well-  
11 supported by the medical evidence, including the  
12 claimant's medical history and clinical and  
13 objective signs and findings as well as detailed  
14 treatment notes, which provides a reasonable basis  
15 for claimant's chronic symptoms and resulting  
16 limitations. Moreover, their opinions are not  
17 inconsistent with other substantial evidence of  
18 record.

19 Dr. Rodriguez reported on June 17, 2006, that  
20 the claimant had a GAF of 70 and was stable on his  
21 psychiatric medications. He was found to have no  
22 mental functional limitations.

23 Dr. Glassman reported on February 3, 2009,  
24 that the claimant had a GAF of 50 and that it  
25 would be difficult for him to return to productive  
26 full time work given his combination of problems  
27 and it would be difficult for him to return to  
28 strenuous, physical labor. His ongoing depression  
and anxiety was likely to impair his ability to  
retrain successfully in a nonphysical type of  
employment. He had limited intellectual  
functioning that further impaired his capacity for  
flexibility and adaptability and creative change.

The undersigned, per SSR 96-6p considered  
these options because they were based upon a  
thorough review of the evidence and familiarity  
with Social Security Rules and Regulations and  
legal standards set forth therein. Although the  
state agency consultant opined that the claimant  
had first no mental limitations and then disabling  
mental impairments, the claimant's medical  
condition indicates moderate limitations.  
Moreover, these doctors did not have the  
opportunity to listen to the sworn testimony of  
the claimant or to observe the claimant's  
demeanor.

. . . .

A Psychiatric Review Technique dated June 26,  
2006, by H. Amando, M.D., a State psychiatric

consultant, found that the objective medical evidence supported a finding that the claimant had medically determinable dysthymic disorder that was not severe. The undersigned . . . considered this opinion because it was based upon a thorough review of the evidence and familiarity with Social Security Rules and Regulations and legal standards set forth therein. Although the state agency consultant opined that the claimant did not have a severe mental impairment, the claimant's medical condition indicates severe mental limitations. Moreover, this doctor did not have an opportunity to review to [sic] the additional medical evidence submitted after their evaluations or to listen to he sworn testimony of the claimant or to observe claimant's demeanor.

. . . .

10. Through the dated last insured, considering the claimant's age, education, work experience, and residual functional capacity, there were jobs that existed in significant numbers in the national economy that the claimant could have performed.

. . . .

11. The claimant was not under a disability, as defined in the Social Security Act, at any time from December 11, 2002, the alleged onset date, through December 31, 2007, the date last insured.

(Id. Attach. #2, 27-36 (citations omitted).)

Based on all of the above, Judge Steinman held that Olivera was not entitled to disability insurance benefits from December 11, 2002, through December 31, 2007, the date he was last insured.

(Id. at 36.)

## V. STANDARD OF REVIEW

### A. Generally

To qualify for disability benefits under the Social Security Act, an applicant must show two things: (1) He or she suffers from a medically determinable impairment that can be expected to last for a continuous period of twelve months or more, or would result in death; and (2) the impairment renders the applicant

1 incapable of performing the work that he or she previously  
2 performed or any other substantially gainful employment that  
3 exists in the national economy. See 42 U.S.C.A. §§ 423(d)(1)(A),  
4 (2)(A) (West Supp. 2010). An applicant must meet both  
5 requirements to be classified as "disabled." Id.

6 Sections 205(g) and 1631(c)(3) of the Social Security Act  
7 allow applicants whose claims have been denied by the SSA to seek  
8 judicial review of the Commissioner's final agency decision. 42  
9 U.S.C.A. §§ 405(g), 1383(c)(3) (West Supp. 2010). The Court  
10 should affirm the decision unless "it is based upon legal error or  
11 is not supported by substantial evidence." Bayliss v. Barnhart,  
12 427 F.3d 1211, 1214 n.1 (9th Cir. 2005) (citing Tidwell v. Apfel,  
13 161 F.3d 599, 601 (9th Cir. 1999)).

14 "Substantial evidence is such relevant evidence as a  
15 reasonable mind might accept as adequate to support [the ALJ's]  
16 conclusion[,]" considering the record as a whole. Webb v.  
17 Barnhart, 433 F.3d 683, 686 (9th Cir. 2005) (citing Richardson v.  
18 Perales, 402 U.S. 389, 401 (1971)). It means "'more than a mere  
19 scintilla but less than a preponderance'" of the evidence.  
20 Bayliss, 427 F.3d at 1214 n.1 (quoting Tidwell, 161 F.3d at 601).  
21 "[T]he court must consider both evidence that supports and the  
22 evidence that detracts from the ALJ's conclusion . . . ." Frost  
23 v. Barnhart, 314 F.3d 359, 366-67 (9th Cir. 2002) (quoting Jones  
24 v. Heckler, 760 F.2d 993, 995 (9th Cir. 1985)).

25 To determine whether a claimant is "disabled," the Social  
26 Security regulations use a five-step process outlined in 20 C.F.R.  
27 § 404.1520 (2010). If an applicant is found to be "disabled" or  
28 "not disabled" at any step, there is no need to proceed further.



1 Ukolov v. Barnhart, 420 F.3d 1002, 1003 (9th Cir. 2005) (quoting  
2 Schneider v. Comm'r of Soc. Sec. Admin., 223 F.3d 968, 974 (9th  
3 Cir. 2000)). Although the ALJ must assist the applicant in  
4 developing a record, the applicant bears the burden of proof  
5 during the first four steps. Tackett v. Apfel, 180 F.3d 1094,  
6 1098 & n.3 (9th Cir. 1999). If the fifth step is reached,  
7 however, the burden shifts to the Commissioner. Id. at 1098. The  
8 steps for evaluating a claim are as follows:

9       **Step 1.** Is the claimant presently working in a  
10 substantially gainful activity? If so, then the  
11 claimant is "not disabled" within the meaning of the  
12 Social Security Act and is not entitled to disability  
13 insurance benefits. If the claimant is not working in a  
14 substantially gainful activity, then the claimant's case  
15 cannot be resolved at step one and the evaluation  
16 proceeds to step two.

17       **Step 2.** Is the claimant's impairment severe? If  
18 not, then the claimant is "not disabled" and is not  
19 entitled to disability insurance benefits. If the  
20 claimant's impairment is severe, then the claimant's  
21 case cannot be resolved at step two and the evaluation  
22 proceeds to step three.

23       **Step 3.** Does the impairment "meet or equal" one of  
24 a list of specific impairments described in the  
25 regulations? If so, the claimant is "disabled" and  
26 therefore entitled to disability insurance benefits. If  
27 the claimant's impairment neither meets nor equals one  
28 of the impairments listed in the regulations, then the  
29 claimant's case cannot be resolved at step three and the  
30 evaluation proceeds to step four.

31       **Step 4.** Is the claimant able to do any work that  
32 he or she has done in the past? If so, then the  
33 claimant is "not disabled" and is not entitled to  
34 disability insurance benefits. If the claimant cannot  
35 do any work he or she did in the past, then the  
36 claimant's case cannot be resolved at step four and the  
37 evaluation proceeds to the fifth and final step.

38       **Step 5.** Is the claimant able to do any other work?  
39 If not, then the claimant is "disabled" and therefore  
40 entitled to disability insurance benefits. If the  
41 claimant is able to do other work, then the Commissioner  
42 must establish that there are a significant number of  
43 jobs in the national economy that claimant can do.  
44 There are two ways for the Commissioner to meet the



1       burden of showing that there is other work in  
 2       "significant numbers" in the national economy that  
 3       claimant can do: (1) by the testimony of a vocational  
 4       expert, or (2) by reference to the Medical-Vocational  
 5       Guidelines at 20 C.F.R. pt. 404, subpt. P, app. 2. If  
 6       the Commissioner meets this burden, the claimant is "not  
 7       disabled" and therefore not entitled to disability  
 8       insurance benefits. If the Commissioner cannot meet  
 9       this burden, then the claimant is "disabled" and  
 10       therefore entitled to disability benefits.

11       Id. at 1098-99 (footnotes and citations omitted); see also  
 12       Bustamante v. Massanari, 262 F.3d 949, 954 (9th Cir. 2001) (giving  
 13       an abbreviated version of the five steps).

14       Section 405(g) permits this Court to enter a judgment  
 15       affirming, modifying, or reversing the Commissioner's decision.  
 16       42 U.S.C.A. § 405(g). The matter may also be remanded to the  
 17       Social Security Administration for further proceedings. Id.  
 18       After a case is remanded and an additional hearing is held, the  
 19       Commissioner may modify or affirm the original findings of fact or  
 20       the decision. Id.

21       "If the evidence can reasonably support either affirming or  
 22       reversing the Secretary's conclusion, the court may not substitute  
 23       its judgment for that of the Secretary." Flaten v. Sec'y Health &  
 24       Human Servs., 44 F.3d 1453, 1457 (9th Cir. 1995). Instead, it  
 25       must uphold the denial of benefits if the evidence is susceptible  
 26       to more than one rational interpretation, one of which supports  
 27       the ALJ's decision. Burch v. Barnhart, 400 F.3d 676, 679 (9th  
 28       Cir. 2005).

#### 29       **B. For Treating and Examining Physicians**

30       According to 20 C.F.R. § 404.1527(d), a treating physician's  
 31       opinion must be accorded controlling weight if it is "well-  
 32       supported by medically acceptable clinical and laboratory  
 33       diagnostic techniques and . . . not inconsistent with the other

1 substantial evidence in [the] case record . . . ." 20 C.F.R. §  
2 404.1527(d)(2) (2010). If the treating physician's opinion is not  
3 given controlling weight, the following factors are applied to  
4 determine what weight to give the opinion: (1) the length of the  
5 treatment relationship and the frequency of examination, (2) the  
6 nature and extent of the treatment relationship, (3) the  
7 supportability of the opinion, (4) the consistency of the opinion  
8 with the record as a whole, (5) the specialization of the treating  
9 physician, and (6) any other factors brought to the attention of  
10 the ALJ which tend to support or contradict the opinion. Id. §  
11 404.1527(d)(2)(I)-(ii), (d)(3)-(6).

12 Opinions of treating physicians may only be rejected under  
13 certain circumstances. See Batson v. Comm'r of Soc. Sec. Admin.,  
14 359 F.3d 1190, 1195 (9th Cir. 2004). "Cases in [the Ninth  
15 Circuit] distinguish among the opinions of three types of  
16 physicians: (1) those who treat the claimant (treating  
17 physicians); (2) those who examine but do not treat the claimant  
18 (examining physicians); and (3) those who neither examine nor  
19 treat the claimant (nonexamining physicians)." Lester v. Chater,  
20 81 F.3d 821, 830 (9th Cir. 1995).

21 The standard for determining whether an ALJ properly rejected  
22 the opinion of a treating physician varies. If the treating  
23 doctor's opinion is not contradicted by another physician, the ALJ  
24 must give clear and convincing reasons for rejecting it. Thomas  
25 v. Barnhart, 278 F.3d 947, 957 (9th Cir. 2002); see also Spelatz  
26 v. Astrue, 321 F. App'x 689, 692 (9th Cir. 2009); Lester, 81 F.3d  
27 at 830.

1 On the other hand, if the treating physician's opinion is  
2 contradicted, "[t]he ALJ must give specific, legitimate reasons  
3 for disregarding the opinion of the treating physician.'" Batson,  
4 359 F.3d at 1195 (quoting Matney v. Sullivan, 981 F.2d 1016, 1019  
5 (9th Cir. 1992); see also Lingenfelter v. Astrue, 504 F.3d 1028,  
6 1042 (9th Cir. 2007). An ALJ may discredit opinions "that are  
7 conclusory, brief, and unsupported by . . . objective medical  
8 findings." Batson, 359 F.3d at 1195.

9 "The opinion of an examining physician is, in turn, entitled  
10 to greater weight than the opinion of a nonexamining physician."  
11 Lester v. Chater, 81 F.3d at 830 (citing Pitzer v. Sullivan, 908  
12 F.2d 502, 506 (9th Cir. 1990); Gallant v. Heckler, 753 F.2d 1450,  
13 1454 (9th Cir. 1984)). Similar to the standard for treating  
14 physicians, if the examining doctor's opinion is not contradicted,  
15 the ALJ must give clear and convincing reasons for rejecting it.  
16 Lester, 81 F.3d at 830. "[T]he opinion of an examining doctor,  
17 even if contradicted by another doctor, can only be rejected for  
18 specific and legitimate reasons that are supported by substantial  
19 evidence in the record." Id. at 830-31 (citing Andrews v.  
20 Shalala, 53 F.3d 1035, 1043 (9th Cir. 1995)).

21 **C. For Nontreating and Nonexamining Physicians**

22 "[T]he findings of a nontreating, nonexamining physician can  
23 amount to substantial evidence, so long as other evidence in the  
24 record supports those findings." Saelee v. Chater, 94 F.3d 520,  
25 522 (9th Cir. 1996). The nonexamining physician's opinion must be  
26 "supported by other evidence in the record and [be] consistent  
27 with it." Morgan, 169 F.3d at 600.

28

1 VI. DISCUSSION

2 A. Whether the ALJ's Decision is Free From Legal Error and  
 3 Based on Substantial Evidence

4 The thrust of Plaintiff's Motion for Summary Judgment is that  
 5 the ALJ erred by failing to properly consider Drs. Fontana,  
 6 Netter, and Brickman's opinions that Olivera was temporarily,  
 7 partially psychiatrically disabled for workers' compensation  
 8 purposes. (Pl.'s Mot. Summ. J. 5, ECF No. 12.)

9 Defendant asserts that "whether a Workers' Compensation  
 10 doctor believes a claimant is 'temporarily' and only 'partially'  
 11 disabled due to a psychiatric impairment is not particularly  
 12 probative evidence in the context of a Social Security disability  
 13 case where a claimant has to prove that he cannot perform any job  
 14 for at least 12 months." (Def.'s Cross-Mot. Summ. J. Attach. #1  
 15 Mem. P. & A. 8 (citation and emphasis omitted), ECF No. 14.)

16 1. **Analyses for Workers' Compensation and**  
 17 **Social Security Benefits**

18 Social Security and workers' compensation claims are not the  
 19 same. See Desrosiers v. Sec'y of Health & Human Servs., 846 F.2d  
 20 573, 576 (9th Cir. 1988). An administrative law judge should  
 21 evaluate a doctor's opinions in the proper context. See id.; but  
 22 cf. Mejia-Raiagoza v. Astrue, Case No. 1:09cv0441 DLB, 2010 WL  
 23 1797245, at \*7 (E.D. Cal. May 3, 2010) (explaining that an ALJ is  
 24 not required to translate workers' compensation terminology to a  
 25 social security setting). "The categories of work under the  
 26 Social Security disability scheme are measured quite differently  
 27 [from the categories under California's workers' compensation  
 28 program]." See Desrosiers, 846 F.2d at 576.

1 Findings made in a workers' compensation case are not  
2 conclusive in a Social Security case. See Macri v. Chater, 93  
3 F.3d 540, 543-44 (9th Cir. 1996)(citing Desrosiers, 846 F.2d at  
4 576). "Nonetheless, an ALJ may not ignore a doctor's medical  
5 opinion merely because it was issued in the context of a workers'  
6 compensation action." Mejia-Raiqoza v. Astrue, 2010 WL 1797245,  
7 at \*7 (citing Lester v. Chater, 81 F.3d at 832; Booth v. Barnhart,  
8 181 F. Supp. 2d at 1105).

9 Here, on October 27, 2004, Dr. Brickman found that Olivera  
10 was temporarily, partially psychiatrically disabled as stated in  
11 his Agreed Medical/Legal Evaluation in Psychiatry made in  
12 connection with Plaintiff's workers' compensation claim. (Admin.  
13 R. Attach. #7, 532, 544, ECF No. 9.) On December 17, 2004, Dr.  
14 Fontana concluded his initial consultation with Olivera and found  
15 Plaintiff was temporarily, partially psychiatrically disabled as  
16 part of his workers' compensation analysis. (Id. at 314, 321.)  
17 On May 23, 2005, Dr. Netter performed a psychological consultation  
18 as part of Olivera's workers' compensation case and stated that  
19 Plaintiff was temporarily, partially psychiatrically disabled.  
20 (Id. at 554, 566.) Dr. Netter again reported that Plaintiff was  
21 temporarily, partially psychiatrically disabled on October 3,  
22 2005, in the psychological treatment report regarding Olivera's  
23 workers' compensation case. (Id. at 607, 611.)

24 Administrative Law Judge Steinman addressed Drs. Fontana and  
25 Brickman's findings that Olivera was temporarily, partially  
26 psychiatrically disabled. (Id. Attach. #2, 32.) Judge Steinman  
27 stated:

28 A treating physician's medical opinion, on the  
issue of the nature and severity of an impairment,

1 is entitled to special significance; and, when  
 2 supported by objective medical evidence and  
 3 consistent with otherwise substantial evidence of  
 4 record, entitled to controlling weight. However,  
 5 statements that a claimant is 'disabled', 'unable  
 6 to work' can or cannot perform a past job, meets a  
 7 listing or the like are not medical opinions but  
 8 are administrative findings dispositive of a case,  
 9 requiring familiarity with the Regulations and  
 10 legal standards set forth therein and in the  
 11 Dictionary of Occupational Titles. Such issues  
 12 are reserved to the Commissioner. Furthermore,  
 13 the record fails [to] support the doctor's opinion  
 14 that claimant is incapable of all work.

15 (Id.) The judge did not discuss Dr. Netter's opinion that  
 16 Plaintiff was temporarily, partially psychiatrically disabled.  
 17 But ALJ Steinman properly observed there is a difference between a  
 18 disability finding in the workers' compensation context and one  
 19 made when deciding eligibility for Social Security benefits. See  
 20 Desrosiers, 846 F.2d at 576. A finding that Plaintiff was  
 21 temporarily, partially psychiatrically disabled for workers'  
 22 compensation purposes, is not conclusive here. See Macri, 93 F.3d  
 23 at 543-44 (citing Desrosiers, 846 F.2d at 576). ALJ Steinman  
 24 properly recognized the distinction between Olivera's prior  
 25 workers' compensation case and a claim for disability insurance  
 26 benefits. Still, the ALJ's decision must be free of legal error  
 27 and supported by substantial evidence.

## 28 **2. Plaintiff's Mental Limitations**

Administrative Judge Steinman explained why Olivera's mental  
 impairments did not meet or equal any medical listing.

To satisfy the 'paragraph B' criteria, the mental  
 impairment must result in at least two of the  
 following: marked restriction of activities of  
 daily living; marked difficulties in maintaining  
 social functioning; marked difficulties in  
 maintaining concentration, persistence, or pace;  
 or repeated episodes of decompensation, each of  
 extended duration. A marked limitation means more  
 than moderate but less than extreme.

1 (Admin. R. Attach. #2, 28.)

2 The ALJ found that Olivera had mild restriction in his  
3 activities of daily living. (Id. at 29.) He cited Dr.  
4 Rodriguez's June 17, 2006 report, which stated "that the claimant  
5 is able to dress and undress himself, drive a car, run errands, go  
6 to the store, cook, participate in household chores, go for walks,  
7 watch television, handle cash, and pay bills." (Id.) The judge  
8 also cited Dr. Glassman's more recent report, dated February 3,  
9 2009, which noted "that the claimant is able to perform his self  
10 grooming, help with household chores, wash dishes, pick up, go  
11 grocery shopping, help his wife at the Laundromat, rake leaves, go  
12 for walks, and watch television." (Id.)

13 The administrative law judge found that Olivera had mild  
14 difficulties in social functioning. (Id.) "[Plaintiff] reported  
15 that he lived with his wife and child, talked over the telephone  
16 with people and met them socially, and went to church." (Id.)  
17 The ALJ noted Dr. Fontana's report, dated December 17, 2004,  
18 disclosed "that the claimant lived with his wife and two  
19 children." (Id.) Dr. Glassman's February 3, 2009 report stated  
20 "that the claimant was married and worked with his wife in daily  
21 activities." (Id.)

22 Judge Steinman determined that Olivera had moderate  
23 difficulties with concentration, persistence, and pace. (Id.)  
24 "His cognitive ability and memory are intact and the medical  
25 reports indicate that he functions at a higher level that would  
26 allow him to do basic work activity." (Id.) ALJ Steinman  
27 observed "that the claimant went into great detail answering his  
28 adult function report and disability report. This is indicative

1 of an ability to maintain an acceptable level of concentration to  
2 perform at least simple tasks." (Id.) Finally, the judge noted  
3 that Olivera "had experienced no episodes of decompensation, which  
4 have been of extended duration." (Id.) Judge Steinman identified  
5 evidence to support his finding that Olivera did not have a mental  
6 impairment which met or equaled any medical listing. (Id. at 28-  
7 29.) He identified reports, findings, and testimony to support  
8 his assessment. (Id.)

9 Olivera asserts that "[t]he ALJ ignored the opinions of Drs.  
10 Fontana, Netter, Brickman and Glassman." (Pl.'s Mot. Summ. J. 5  
11 (emphasis added), ECF No. 12.) Even a cursory review of Judge  
12 Steinman's decision reveals that he considered the doctors'  
13 opinions. (Admin. R. Attach. #2, 29-33, ECF No. 9.) This is not  
14 a case in which the administrative law judge omitted discussion of  
15 certain doctors altogether. Olivera's contention is that the ALJ  
16 afforded the doctors' opinions insufficient weight.

17 Plaintiff faults Judge Steinman for not giving adequate  
18 weight to the opinions of Drs. Fontana and Netter, and for  
19 "failing to provide adequate reasons for his obvious rejection of  
20 these opinions." (Pl.'s Mot. Summ. J. 6, ECF No. 12.) The  
21 administrative law judge found that Plaintiff was "limited to  
22 nonpublic, simple, repetitive work that requires limited contact  
23 with coworkers." (Admin. R. Attach. #2, 30, ECF No. 9.) Olivera  
24 does not explain what restrictions he believes are appropriate  
25 after Drs. Fontana, Netter, Brickman, and Glassman's opinions are  
26 afforded more weight. Plaintiff appears to contend that the  
27 Commissioner's denial of benefits should be set aside for legal  
28 error and as unsupported by substantial evidence. (Pl.'s Mot.



Summ. J. 5, ECF No. 12); see Mayes v. Massanari, 276 F.3d 453, 458-59 (9th Cir. 2001). Defendant urges that substantial evidence supports the ALJ's mental capacity finding. (Def's Cross-Mot. Summ. J. Attach. #1 Mem. P. & A. 3, ECF No. 14.)

### 3. Treating and Examining Physicians

Judge Steinman summarized his reasons for concluding that Olivera did not suffer from a mental disability. "In terms of the claimant's alleged disabling [mental] impairments, the record fails to document any objective clinical findings establishing that the claimant was not able to perform work in light of the reports of the treating and examining practitioners and the findings made on examination." (Admin. R. Attach. #2, 31, ECF No. 9.) The ALJ explained that his decision was based on evidence in the record from Plaintiff's treating and examining doctors. (Id.) He identified the specific reports and findings that did not support Olivera's claim of total mental disability.

Dr. Fontana reported on December 17, 2004, that . . . [claimant's] thought processes were logical and goal directed and there was no evidence of hallucinations or delusions. He was oriented in all spheres and his immediate, recent, and remote memory was intact. Dr. Rodriguez reported on June 17, 2006, that the claimant was coherent and organized and there was no tangentiality or loosening of associations. He was relevant and nondelusional. He denied any auditory or visual hallucinations. He was alert and oriented in all spheres. . . . Dr. Glassman reported on February 3, 2009, that the claimant stated that he could perform a very simple job that was not physically demanding and would allow him to change position frequently. He had no evidence of anxiety and was able to follow instructions.

(Id.)

Judge Steinman cited reports of the treating physician, Dr. Fontana, dated December 17, 2004, and reports of examining

1 physicians, Dr. Rodriguez, dated June 16, 2006, and Dr. Glassman,  
2 dated February 3, 2009. (Id.) The ALJ concluded that the  
3 findings in these reports that Olivera was well oriented, had  
4 intact memory, showed no evidence of loosening associations, and  
5 believed he could perform simple work showed that the objective  
6 medical evidence did not substantiate mental limitations to the  
7 extent asserted by Olivera. (Id.) Judge Steinman credits the  
8 doctors' opinions in these reports. This description of the  
9 records that undermine Plaintiff's claim of mental disability  
10 identifies substantial evidence supporting the ALJ's decision.

11 **a. Dr. Fontana**

12 Plaintiff argues that "[t]he ALJ failed to comply with 20  
13 C.F.R. § 416.927 by failing to accord adequate weight to the  
14 opinion of the Mr. Olivera's [sic] treating psychiatrist and  
15 treating psychologist, Dr. Fontana and Dr. Netter, and by failing  
16 to provide adequate reasons for his obvious rejection of these  
17 opinions." (Pl.'s Mot. Summ. J. 5-6, ECF No. 12.) Olivera  
18 contends that the opinions of these treating physicians deserve  
19 controlling weight, and "[e]ven if the ALJ does not find that a  
20 treating physician's opinion is entitled to controlling weight, he  
21 or she must consider the factors set forth in 20 C.F.R. §  
22 404.1527(d) in evaluating any medical source opinion." (Id. at  
23 6.) Those factors include "length of treatment, frequency of  
24 examination, nature and extent of the treatment relationship,  
25 support of opinion afforded by medical evidence, consistency of  
26 opinion with the record as a whole, and specialization of the  
27 treating physician." (Id. (citation omitted)).

28

1 Defendant's argues that "[t]he ALJ acknowledged that  
2 Plaintiff had been treated by psychiatrist Louis A. Fontana, M.D.,  
3 in the context of his Workers' Compensation claim." (Def.'s  
4 Cross-Mot. Summ. J. Attach. #1 Mem. P. & A. 6 (citation omitted),  
5 ECF No. 14.) Defendant continues, "The ALJ noted that, in  
6 December 2004, Dr. Fontana found that, during an hour and a half  
7 interview, Plaintiff's thought processes were logical and goal  
8 directed, he was fully oriented and had intact immediate, recent  
9 and remote memory." (Id. at 6-7 (citation omitted).)

10 Judge Steinman considered Dr. Fontana's opinion that Olivera  
11 was temporarily, partially psychiatrically disabled for workers'  
12 compensation purposes and gave it "special significance" but held  
13 that "the record fails to support the doctor's opinion that the  
14 claimant is incapable of all work." (Admin. R. Attach. #2, 32,  
15 ECF No. 9.) The ALJ explained that a doctor's statement that an  
16 individual was disabled is not a medical opinion; that  
17 determination is reserved to the Commissioner. (Id.) As  
18 discussed above, state disability guidelines for workers'  
19 compensation purposes are not determinative in Social Security  
20 cases. Macri, 93 F.3d at 543-44 (citing Desrosiers, 846 F.2d at  
21 576).

22 Judge Steinman held that "the record fails to document any  
23 objective clinical findings that [Olivera] was not able to perform  
24 work . . . . (Admin. R. Attach. #2, 31, ECF No. 9.) The  
25 administrative law judge considered tests performed by Dr. Zink on  
26 October 12, 2004, that showed Olivera's concentration was not  
27 significantly impaired, his memory was not impaired, his visual  
28 scanning/speed was a little lower than expected, and his

1 intelligence was borderline to low average. (Id. at 33.) The ALJ  
2 reviewed October 11, 2006 reports by doctors Brickman and Zink  
3 that Olivera's concentration and visual scanning/speed was not  
4 substantially impaired, his memory was unimpaired, and his  
5 intelligence was low average to average. (Id.)

6 Judge Steinman gave Dr. Fontana's opinion special  
7 significance but noted the difference between a disability finding  
8 for workers' compensation purposes and Social Security benefits;  
9 he also found that the objective medical evidence did not support  
10 the level of disability claimed by Plaintiff. These are specific,  
11 legitimate reasons for disregarding Dr. Fontana's conclusions.  
12 Batson, 359 F.3d at 1195. The ALJ's decision was supported by  
13 substantial evidence.

14 **b. Dr. Glassman**

15 Plaintiff states that "Dr. Glassman opined that it would be  
16 difficult for Mr. Olivera to return to productive full time work  
17 given his combination of problems and it would be difficult for  
18 him to return to strenuous, physical labor." (Pl.'s Mot. Summ. J.  
19 7, ECF No. 12.) Plaintiff notes that Dr. Glassman gave him a GAF  
20 score of fifty and found depression and anxiety would make it  
21 unlikely that Olivera could retrain to a nonphysical employment.  
22 (Id.) Olivera was further impaired because he had limited  
23 intellectual functioning. (Id.) Plaintiff concludes, "It was  
24 error for the ALJ to ignore the opinion of Dr. Glassman." (Id.)

25 Defendant explains that the administrative law judge  
26 "acknowledged that, in February 2009, Plaintiff was evaluated by  
27 Jaga N. Glassman, M.D." (Def.'s Cross-Mot. Summ. J. Attach. #1  
28 Mem. P. & A. 5 (citation omitted), ECF No. 14.) Defendant noted

1 that "Dr. Glassman's evaluation was done more than two years after  
2 Plaintiff was last insured for [disability insurance benefits]."  
3 (Id.) Although Dr. Glassman found that it would be difficult for  
4 Olivera to perform full-time work, the doctor also "found  
5 Plaintiff was able to care for himself, help with household  
6 chores, wash dishes, do some 'picking up,' grocery shop, help his  
7 wife at the Laundromat, rake leaves and go for walks." (Id.  
8 (citation omitted).) Olivera told Glassman that he might be able  
9 to perform a very simple job, he had not been to the doctor in a  
10 while, and he stopped taking medications because they were too  
11 expensive but he failed to seek assistance from "County mental  
12 health services." (Id.) For all of these reasons, Defendant  
13 contends that the ALJ's decision is supported by substantial  
14 evidence. (Id.)

15 Dr. Glassman did not examine Olivera until well after the  
16 last date he was eligible for disability benefits. (Admin. R.  
17 Attach. #2, 27, 31, ECF No. 9.) The doctor saw Plaintiff "at the  
18 request of the California Department of Social Services for a  
19 psychiatric disability evaluation." (Id. at 28.) Judge Steinman  
20 noted Dr. Glassman's conclusions. "[T]he claimant stated that he  
21 could perform a very simple job that was not physically demanding  
22 and would allow him to change position frequently. He had no  
23 evidence of anxiety and was able to follow instructions." (Id. at  
24 31.) The ALJ discussed Dr. Glassman's report:

25 Dr. Glassman reported on February 3, 2009,  
26 that the claimant had a GAF of 50 and that it  
27 would be difficult for him to return to productive  
28 full time work given his combination of problems  
and it would be difficult for him to return to  
strenuous, physical labor. His ongoing depression  
and anxiety was likely to impair his ability to  
retrain successfully in a nonphysical type of

1 employment. He had limited intellectual  
2 functioning that further impaired his capacity for  
flexibility and adaptability and creative change.

3 (Id. at 33)(citation omitted).)

4 The ALJ concluded his discussion of the experts by stating  
5 that he considered "these opinions because based on a thorough  
6 review of the evidence and familiarity with Social Security Rules  
7 and Regulations and legal standards set forth therein." (Id.)  
8 The judge added, "Although the state agency consultants opined  
9 that the claimant had first no mental limitations and then  
10 disabling mental impairments, the claimant's medical condition  
11 indicates moderate limitations. Moreover, these doctors did not  
12 have the opportunity to listen to the sworn testimony of the  
13 claimant or to observe the claimant's demeanor." (Id.)

14 The administrative law judge credited Dr. Glassman's February  
15 3, 2009 report and findings, even though it was prepared after the  
16 disability period. The ALJ did not give significant weight to Dr.  
17 Glassman's GAF assessment and conclusion that it would be  
18 "difficult" for Olivera to return to work, or his finding that  
19 Plaintiff had "limited intellectual functioning." (Id.) A GAF  
20 assessment alone cannot establish disability. See Morgan v.  
21 Comm'r Soc. Sec. Admin., 169 F.3d 595, 600 (9th Cir. 1999). Judge  
22 Steinman found "minimal clinical evidence to corroborate or  
23 support any finding of significant vocational impact related [to  
24 Olivera's other diagnosed conditions.]

25 The law does not "require the ALJ to evaluate in writing  
26 every piece of testimony and evidence submitted." Zalewski v.  
27 Heckler, 760 F.2d 160, 166 (7th Cir. 1985). Courts only require a  
28 "minimal level of articulation by the ALJ as to his assessment of

1 the evidence . . . ." Id. Judge Steinman met this threshold. He  
2 gave specific, legitimate reasons for failing to give all aspects  
3 of Dr. Glassman's consultative medical evaluation significant  
4 weight. See Batson, 359 F.3d at 1195. The contention that Judge  
5 Steinman ignored Dr. Glassman's opinion is plainly incorrect.  
6 (See Pl's Mot. Summ. J. 7.)

7 **c. Dr. Netter**

8 Plaintiff argues that "[t]he ALJ failed to comply with 20  
9 C.F.R. § 416.927 by failing to accord adequate weight to the  
10 opinion of . . . Mr. Olivera's treating psychiatrist and treating  
11 psychologist, Dr. Fontana and Dr. Netter, and by failing to  
12 provide adequate reasons for his obvious rejection of these  
13 opinions." (Id. at 5-6.)

14 Defendant states, "The ALJ acknowledged that Roberto Netter,  
15 Ph.D., had assessed a GAF score of 50." (Def.'s Cross-Mot. Summ.  
16 J. Attach. #1 Mem. P. & A. 7, ECF No. 14.) Defendant concedes  
17 that "[t]he ALJ did not address Dr. Netter's findings in further  
18 detail." (Id. (citation omitted).) He explains that Dr. Netter's  
19 finding that Olivera could not return to his past work is not in  
20 dispute. (Id.) Defendant asserts that the doctor's opinion that  
21 Olivera should not engage in work that would lead to increased  
22 psychologically-mediated pain or increased anxiety or depression  
23 is consistent with the administrative law judge's decision. (Id.)  
24 "The ALJ's limiting Plaintiff to simple, repetitive work that had  
25 little contact with co-workers adequately accounts for these  
26 limitations; thus, any error this court might attribute to he  
27 ALJ's treatment of Dr. Netter's opinion is harmless." (Id.  
28 (citation omitted).)

1 In his decision, ALJ Steinman stated, "As for the opinion  
2 evidence, Robert Netter, Ph.D., reported on June 15, 2005, that  
3 the claimant had a GAF of 50." (Admin. R. Attach. #2, 32  
4 (citation omitted), ECF No. 9.) "On September 26, 2006, Stephen  
5 F. Signer, reported that the claimant had a GAF of 50-60. Dr.  
6 Brickman reported on October 31, 2006, that the claimant had a GAF  
7 of 63.5." (Id. (citations omitted).) The administrative law  
8 judge concluded, "Pursuant to 20 CFR § 404.1527 and Social  
9 Security Ruling 96-2p, the undersigned assigns significant weight  
10 to [Dr. Brickman's] opinion, as it is well-supported by the  
11 medical evidence finding that the claimant has moderate mental  
12 impairment symptoms." (Id.)

13 The ALJ considered Dr. Netter's opinion but assigned it less  
14 weight than Dr. Brickman's. Judge Steinman did not give any  
15 reasons for discounting Dr. Netter's opinion regarding the GAF  
16 score, other than his finding that Dr. Brickman's opinion was  
17 well-supported by the evidence. (Id.) Dr. Brickman had conducted  
18 an agreed medical evaluation of Olivera and issued his report on  
19 October 27, 2004, and then again two years later, on October 31,  
20 2006. (Id. Attach. #7, 532; Attach. #8, 656, 663.)

21 As discussed above, if the treating physician's opinion is  
22 contradicted, "[t]he ALJ must give specific, legitimate reasons  
23 for disregarding the opinion of the treating physician.'" Id.  
24 (quoting Matney, 981 F.2d at 1019); see also Lingenfelter, 504  
25 F.3d at 1042. The ALJ failed to do so with regard to Dr.  
26 Netter's GAF assessment. The judge's preference for a different  
27 psychologist's opinion alone does not set forth adequate "specific  
28 [and] legitimate reasons for disregarding the opinion of the



1 treating physician.'" Batson, 359 F.3d at 1195. Defendant argues  
 2 this is harmless error. (Def.'s Cross-Mot. Summ. J. Attach. #1  
 3 Mem. P. & A. 7 (citing Ukolov v. Barnhart, 420 F.3d 1002, 1006 n.6  
 4 (9th Cir. 2005), ECF No. 14.)

5 "[T]he Commissioner has determined that the GAF scale 'does  
 6 not have a direct correlation to the severity requirements in [the  
 7 Social Security Administration's] mental disorders listings.'" Esquer v. Astrue, No. 08cv636BTM(AJB), 2009 U.S. Dist. LEXIS  
 8 121583, at \*11 (S.D. Cal. Dec. 31, 2009 (citing 65 Fed. Reg.  
 9 50,746, 50,765 (Aug. 21, 2000))). "A GAF between 41 and 50  
 10 indicates serious symptoms (e.g. suicidal ideation, severe  
 11 obsessional rituals, frequent shoplifting) or any serious  
 12 impairment in social, occupational, or school functioning (e.g.,  
 13 no friends, unable to keep a job)." Morgan v. Comm'r Soc. Sec.  
 14 Admin., 169 F.3d at 598 n.1. "Expressed in terms of degree of  
 15 severity of symptoms or functional impairments, GAF . . . scores  
 16 of 51 to 60 represent 'moderate', [and] scores of 61 to 70  
 17 represent 'mild[]' . . . ." Hemp v. Astrue, No. 2:09cv34MLM,  
 18 2010 U.S. Dist. LEXIS 59697, at 33 n.3 (E.D. Mo. June 16, 2010).

19 On June 15, 2005, Dr. Netter assigned Olivera a "current" GAF  
 20 score of fifty and found that he was temporarily, partially  
 21 psychiatrically disabled for workers' compensation purposes.  
 22 (Admin. R. Attach. #8, 565-66, 568.) Dr. Netter discussed the  
 23 "Need for Vocational Rehabilitation & Work Restrictions." (Id. at  
 24 567.)  
 25

26 It is reasonable to expect that Mr.  
 27 [Olivera] will not be able to return to his  
 28 customary duties, secondary to residual  
 symptoms of Posttraumatic Stress Disorder. At  
 this time, he is precluded from engaging in  
 work that would lead to increased

1           psychologically-mediated exacerbated physical  
2           pain, for such will lead to increased anxiety  
3           and depression, and maintenance of this  
4           vicious cycle . . . .

5           . . . .

6           At this time it is anticipated that  
7           treatment goals will be reached with  
8           approximately 18 combined individual and group  
9           treatment sessions.

10       (Id.) Dr. Netter's 2005 finding that Olivera was temporarily,  
11       partially disabled is not inconsistent with the administrative law  
12       judge's 2009 decision that Plaintiff was capable of simple,  
13       repetitive work and could have limited contact with coworkers.

14       "While a GAF score may be of considerable help to the ALJ in  
15       formulating the RFC [residual functional capacity], it is not  
16       essential to the RFC's accuracy. Thus, the ALJ's failure to  
17       reference the GAF score in the RFC, standing alone, does not make  
18       the RFC inaccurate." Howard v. Comm'r of Soc. Sec., 276 F.3d 235,  
19       241 (6th Cir. 2002). Thus, it was harmless error for the ALJ to  
20       fail to explain his reasons for discrediting Dr. Netter's GAF  
21       assessment because that opinion did not establish mental  
22       disability or affect the result in this case. See Ukolov, 420  
23       F.3d at 1006 n.6. The mental limitations that Judge Steinman  
24       placed on Olivera do not conflict with Dr. Netter's statement that  
25       Plaintiff should not perform work that would increase his anxiety,  
26       depression, or mentally-induced pain, because the jobs identified  
27       by the ALJ fit within Olivera's residual functional capacity.

28       A court must uphold the denial of benefits if the evidence is  
      susceptible to more than one rational interpretation, one of which  
      supports the ALJ's decision. Burch, 400 F.3d at 679. Dr.

1 Netter's description of workplace options for Plaintiff is  
2 consistent with the ALJ's decision.

3 ALJ Steinman failed to provide specific and legitimate  
4 reasons for preferring Dr. Brickman's GAF assessment over Dr.  
5 Netter's and omitting Dr. Netter's findings that Olivera was  
6 temporarily, partially psychiatrically disabled for workers'  
7 compensation purposes, but any error was harmless.

8 **d. Dr. Brickman**

9 Plaintiff argues that Dr. Brickman found Olivera was  
10 temporarily, partially psychiatrically disabled for two years due  
11 to (1) posttraumatic stress disorder, (2) adjustment disorder with  
12 depressed mood, (3) pain disorder associated with both  
13 psychological factors and a general medical condition, and (4)  
14 anxiety disorder. (Pl.'s Mot. Summ. J. 6, ECF No. 12.) "It was  
15 incumbent on the ALJ to weigh these opinions in his decision."  
16 (Id. at 6-7.)

17 Defendant argues that the administrative law judge properly  
18 evaluated Dr. Brickman's opinion. (Def.'s Cross-Mot. Summ. J.  
19 Attach. #1 Mem. P. & A. 6, ECF No. 14.) "The ALJ noted J. Brand  
20 Brickman, M.D., assessed a GAF score of 63.5 in October 2006,  
21 which is consistent with only moderate symptoms, not disabling  
22 symptoms." (Id. (citations omitted).) "The ALJ further noted  
23 that, also in October 2006, Dr. Brickman opined that Plaintiff did  
24 not appear to have substantially impaired concentration and his  
25 memory was unimpaired." (Id. (citation omitted).)

26 The administrative law judge observed that "Dr. Brickman  
27 reported on October 31, 2006, that the claimant had a GAF of  
28 63.5." (Admin. R. Attach. #2, 32, ECF No. 9.) The ALJ concluded,

1 "Pursuant to 20 CFR § 404.1527 and Social Security Ruling 96-2p,  
2 the undersigned assigns significant weight to [Dr. Brickman's]  
3 opinion [of Olivera's GAF score], as it is well-supported by the  
4 medical evidence finding that the claimant has moderate mental  
5 impairment symptoms." (Id.) Judge Steinman gave this aspect of  
6 Dr. Brickman's conclusions significant weight.

7 In his decision, ALJ Steinman explains that "Dr. Brickman and  
8 Dr. Zink reported on October 11, 2006, that the claimant did not  
9 appear to have substantially impaired concentration or visual  
10 scanning/speed, unimpaired memory, and IQ functioning in the low  
11 average to average range." (Id. at 33.) The judge stated his  
12 reasons for giving these opinions significant weight:

13 Pursuant to 20 CFR § 404.1527, the  
14 undersigned assigns significant weight to these  
15 examining doctor's opinions, as they are well-  
16 supported by the medical evidence, including the  
17 claimant's medical history and clinical and  
18 objective signs and findings as well as detailed  
19 treatment notes, which provides a reasonable basis  
20 for claimant's chronic symptoms and resulting  
21 limitations. Moreover, their opinions are not  
22 inconsistent with other substantial evidence of  
23 record.

19 (Id.)

20 Plaintiff's argument that Dr. Brickman was not afforded  
21 sufficient weight appears to focus on the doctor's 2004 report.  
22 (Compare Pl's Not. Summ. J. 6-7, ECF No. 12, with Admin. R.  
23 Attach. #7, 543-44, ECF No. 9.) The ALJ deferred to opinions  
24 contained in Dr. Brickman's 2006 report. In 2004, The doctor  
25 stated that Olivera was temporarily, partially psychiatrically  
26 disabled and required psychiatric treatment. (Admin. R. Attach.  
27 #7, 544, ECF No. 9.) In 2006, he noted that Plaintiff had  
28 "received considerable benefit from his contacts with Dr. Netter .

1 . . ." (Id. at 639.) Dr. Brickman discussed Olivera's mental  
2 condition. "I do not believe that Mr. [Olivera], on the basis of  
3 a work-related, purely Psychiatric Disability, is currently  
4 incapable of returning to his usual and customary occupation . . .  
5 ." (Id.) The ALJ discussed the 2004 and 2006 reports. (Id.  
6 Attach. #2, 32-33.) Judge Steinman did not err by affording Dr.  
7 Brickman's 2006 opinion more weight.

#### 8 4. Other Disabling Conditions

9 Plaintiff also argues that "the ALJ failed to consider all of  
10 Mr. Olivera's disabling conditions." (Pl.'s Mot. Summ. J. 7, ECF  
11 No. 9.) Plaintiff contends that it was error for Judge Steinman  
12 to find Olivera suffered from depression and not (1) posttraumatic  
13 stress disorder, (2) adjustment disorder with depressed mood, (3)  
14 pain disorder associated with both psychological factors and a  
15 general medical condition, (4) anxiety disorder, (5) panic  
16 disorder with phobic avoidance, and (6) borderline intellectual  
17 functioning. (Id.) He states that the judge's finding that these  
18 conditions had minimal clinical evidence to corroborate them was  
19 insufficient, and the ALJ should have considered them in  
20 combination. (Id.)

21 Defendant argues that Plaintiff has failed to show he was  
22 disabled due to "other psychiatric conditions that were diagnosed  
23 at one time or another." (Def.'s Cross-Mot. Summ. J. Attach. #1  
24 Mem. P. & A. 9 (citation omitted), ECF No. 14.) Defendant alleges  
25 that none of those other conditions were disabling "as the  
26 Commissioner has never found Plaintiff to be disabled and  
27 Plaintiff cannot overcome that fact by characterizing diagnoses as  
28 'disabling.'" (Id. (citation omitted).) Also, "a diagnosis is

1 not evidence of disability." (Id. (citation omitted).) "Finally,  
2 Plaintiff fails to explain what additional limitations the ALJ  
3 might have assessed based on any of the diagnoses to which he  
4 refers." (Id.)

5 "[A] claimant carries the initial burden of proving a  
6 disability." Burch v. Barnhart, 400 F.3d at 683 (citing Swenson  
7 v. Sullivan, 876 F.2d 683, 687 (9th Cir. 1989).) Claimants may  
8 prove their disability with medical opinions, defined as  
9 "statements from physicians and psychologists or other acceptable  
10 medical sources." 20 C.F.R. §§ 404.1527(a), 416.927(a) (West  
11 2008). "An ALJ is not required to discuss the combined effects of  
12 a claimant's impairments or compare them to any listing in an  
13 equivalency determination, unless the claimant presents evidence  
14 in an effort to establish equivalence." Burch, 400 F.3d at 683  
15 (citing Lewis v. Apfel, 236 F.3d 503, 514 (9th Cir. 2001).)

16 Here, Olivera faults Judge Steinman for failing to consider  
17 the combined effects of posttraumatic stress disorder, adjustment  
18 disorder with depressed mood, pain disorder associated with both  
19 psychological factors and a general medical condition, anxiety  
20 disorder, panic disorder with phobic avoidance, and borderline  
21 intellectual functioning, but he does not identify which medical  
22 listing he believes these multiple diagnoses meet or equal. It is  
23 Plaintiff's initial burden to prove his alleged disability.

24 Burch, 400 F.3d at 683. Merely asserting the ALJ should not have  
25 fragmentize the effects of Olivera's diagnoses is insufficient.  
26 Id.

27 The ALJ must consider whether the combination of impairments  
28 is the medical equivalence of a listed impairment. Lester v.

1 Chater, 81 F.3d at 829. Here, Judge Steinman concluded that  
2 Olivera did not have an impairment or combination of impairments  
3 that met or medically equaled a listed impairment. (Admin. R.  
4 Attach. #2, 28, ECF No. 9.) The ALJ discussed the Plaintiff's  
5 difficulties and limitations. (Id. at 28-30.) "The complainant  
6 is required to offer a theory as to how the combined effect of  
7 [his] impairments equal a listed impairment." Coley v. Astrue,  
8 CV09-3050-PK 2010 U.S. Dist. LEXIS 83077, at \*58 (D. Or. Aug. 12,  
9 2010)(citing Lewis v. Apfel, 236 F.3d at 514). Olivera has not  
10 "pointed to evidence that shows that his combined impairments  
11 equal a listed impairment." Lewis, 236 F.3d at 514. "The ALJ  
12 satisfied his duty to support his conclusion that the combined  
13 effect of [Olivera's] impairments did not meet or equal a listed  
14 impairment by providing an in depth analysis of the medical  
15 record." Coley, CV09-3050-PK, 2010 U.S. Dist. LEXIS 83077, at  
16 \*59. The claim that the administrative law judge erred in failing  
17 to consider the combined effects of Olivera's other diagnoses is  
18 without merit.

## 19 VII. CONCLUSION AND RECOMMENDATION

20 "The decision of the Commissioner must be upheld if it is  
21 supported by substantial evidence and if the Commissioner applied  
22 the correct legal standards." Howard ex rel. Wolff v. Barnhart,  
23 341 F.3d 1006, 1011 (9th Cir. 2003) (citing Pagter v. Massanari,  
24 250 F.3d 1255, 1258 (9th Cir. 2001)). If the ALJ's decision is  
25 not supported by substantial evidence, remand or reversal is  
26 appropriate. Gallant v. Heckler, 753 F.2d 1450, 1457 (9th Cir.  
27 1984).

1 For the reasons stated above, the Court recommends **DENYING**  
2 Plaintiff's Motion for Summary Judgment [ECF No. 12], and **GRANTING**  
3 Defendant's Cross-Motion for Summary Judgment [ECF No. 14].

4 This Report and Recommendation will be submitted to the  
5 United States District Court Judge assigned to this case, pursuant  
6 to the provisions of 28 U.S.C. § 636(b)(1). Any party may file  
7 written objections with the Court and serve a copy on all parties  
8 on or before December 14, 2010. The document should be captioned  
9 "Objections to Report and Recommendation." Any reply to the  
10 objections shall be served and filed on or before January 4, 2011.  
11 The parties are advised that failure to file objections within the  
12 specified time may waive the right to appeal the district court's  
13 order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

14  
15 DATED: November 22, 2010

  
16 Ruben B. Brooks  
17 United States Magistrate Judge

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cc: Judge Sammartino  
All Parties